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No. 91-2011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROCCO P. DIGIOVANNI, JR.,
Petitioner,

VS.

TRAYLOR BROTHERS, INC.,
Respondent.

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RULE 29.1 LIST

Respondent Traylor Brothers, Inc. does nct have any subsidiaries, parent companies or affiliates that have issued shares of stock to the public.

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STATEMENT OF THE CASE

Plaintiff/Petitioner Rocco P. DiGiovanni, Jr. ("DiGiovanni") filed a Complaint against his employer Defendant/Respondent Traylor Brothers, Inc. ("Traylor Brothers") in the United States District Court for the District of Rhode Island. DiGiovanni's Complaint was submitted to a jury, after trial on May 14, 15 and 17, 1990, on three counts: Count I for negligence under the Jones Act, 46 U.S.C. §688; Count II for unseaworthiness under the General Maritime Law; and, alternatively, Count V for negligence under section 905(b) of The Longshore and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. §901 et.seq. The jury found in favor of DiGiovanni on Counts I and II

and awarded damages of Three Hundred Thirty-Three thousand Four Hundred and Sixteen Dollars ($333,416).

Traylor Brothers appealed to the United States Court of Appeals for the First Circuit (No. 90-1957) and raised two issues on appeal. First, Traylor Brothers argued that DiGiovanni did not meet the test for status of a "seaman" under the Jones Act because his employment did not contribute to the "navigation or transportation function" of the vessel or structure to which he was assigned. At the time of the appeal, the circuits were split on the appropriate standard for the employment relation prong of the "seaman" test[1] and this Court had granted certiorari in *Wilander v. McDermott International, Inc.*, 887 F.2d 88 (5th Cir.), *cert. granted*, __ U.S. __, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990) to consider the issue. This Court handed down its decision in *Wilander*, 498 U.S. __, 111 S.Ct. 807, 112 L.Ed. 2d 866 (1991), on February 19, 1991, while Traylor Brothers's appeal was pending. The *Wilander* decision resolved this pending issue adversely to Traylor Brothers.

The second issue raised by Traylor Brothers' in its appeal concerned whether the spud barge Betty F, used as a work platform for pile-driving operations, and the supply barge on which DiGiovanni was injured, were "vessels in navigation" under the vessel prong of the "seaman" test. The First Circuit had not considered this issue since 1975 in *Bennett v. Perini Corp.*, 510 F.2d 114 (lst Cir. 1975). Since that time, other circuits had narrowed the scope of the test for structures to qualify as "vessels

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[1] In *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), the Fifth Circuit applied the more expansive "contribution to the function of the vessel or accomplishment of its mission" test. The Seventh Circuit, in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985), applied the more restrictive "aid to the navigation or transportation function" standard.

in navigation" for purposes of the Jones Act.[2] Traylor Brothers contended, on appeal, that the First Circuit should depart from the vessel standard in *Bennett v. Perini Corp.*, and conform its vessel test to the prevailing standard utilized in other circuits — in the interest of uniformity among the circuits on the issue.

On April 17, 1991, the First Circuit affirmed the district court (App. C, Petition for Writ of Certiorari ("Petition")), holding that: (1) the *Wilander* decision determined the employment relation prong issue adversely to Traylor Brothers, and (2) the panel of the appellate court was "constrained by First Circuit precedent" from adopting the prevailing vessel test in other circuits.

Traylor Brothers filed its timely Motion for Rehearing or Rehearing En Banc. On September 11, 1991, the First Circuit (En Banc) entered its order withdrawing the decision of the panel and vacating the judgment of the court. Rehearing en banc was granted "limited to the question of whether *Bennett v. Perini Corp.*, 510 F.2d 114 (lst Cir. 1975), should remain circuit precedent; and, if not, how a proper reformulation of the rule of law affects the case *sub judice*."

On March 4, 1992, the First Circuit (En Banc) issued its decision (App. A, Petition) reversing the judgment and remanding the case to the district court. In its opinion, the First Circuit discussed the evolution of the "vessel in navigation" test. The First Circuit observed that it had previously followed the Fifth Circuit case of *Offshore Company v. Robinson, supra*, in reaching its 1975 *Bennett* decision. (App. A, pp. 6a-7a, Petition.) The First Circuit, after citing and discussing the Fifth Circuit cases that thereafter revised the "vessel in navigation" standard, held:

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[2] See *Bernard v. Binnings Construction Co. Inc.*, 741 F.2d 824 (5th Cir. 1984); *Ellender v. Kiva Construction & Engineering, Inc.*, 909 F.2d 803 (5th Cir. 1990); *Hurst v. Pilings & Structures. Inc.*, 896 F.2d 504 (llth Cir. 1990).

> Just as we relied on *Offshore* in the past, we believe we should now accept the Fifth Circuit's improved version. In sum, if a barge, or other float's 'purpose or primary business is not navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit.

(App. A, 9a, Petition.)

The First Circuit then applied the undisputed facts of the case to the "vessel in navigation" standard it adopted, in conformance with the prevailing standard in other circuits, and held that the spud barge Betty F was not a vessel in navigation as a matter of law. Accordingly, it denied DiGiovanni any recovery under the Jones Act.[3]

SUMMARY OF ARGUMENT

1. The decision of the First Circuit is not in conflict with decisions of other circuits or decisions of this Court. In fact, the decision brings the First Circuit into conformity with the prevailing standard utilized by the other circuits for the "vessel in navigation" test under the Jones Act.

2. The decision is not in conflict with any federal statute.

3. There are no special or important reasons which would justify the exercise by this Court of its discretion to grant the Petition for Writ of Certiorari.

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[3] The First Circuit did remand the case for a trial on the negligence issue under the LHWCA. (App. A, p. lla, Petition.)

REASONS FOR DENYING THE WRIT

As stated in his Question Presented for Review, DiGiovanni asks this Court to grant certiorari to review the fact laden question of whether the particular floating structure on which he worked was a "vessel" within the meaning of the Jones Act. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This Court has stated: "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Because DiGiovanni can assert no basis for this Court exercising its discretionary jurisdiction through a writ of certiorari, *see* Sup. Ct. R. 10, his petition should be denied.

I. THE DECISION OF THE FIRST CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR DECISIONS OF THIS COURT.

A. THE DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The decision of the First Circuit expressly conformed the "vessel in navigation" standard for the First Circuit to the standard currently utilized in other circuits. The First Circuit last considered this issue in the early 1970's in *Powers v. Bethlehem Steel Corporation*, 477 F.2d 643 (lst Cir. 1973) and *Bennett v. Perini Corporation, supra*. In those cases, the First Circuit followed the then-prevailing view of the Fifth Circuit and held that for a structure to be a vessel ". . . the purpose and business must to some reasonable degree be the transportation of passengers, cargo or equipment from place to place across navigable waters'." *Bennett*, 510 F.2d at 116 (quoting *Powers*, 477 F.2d at 647).

The Fifth Circuit has led in a narrowing of the standard for determining a "vessel in navigation" since 1975. In *Bernard v. Binnings Construction Co. Inc.*, 741 F.2d 824, 831 (5th Cir. 1984), the Fifth Circuit fashioned a three-part test for determining, as a matter of law, whether a structure qualified as a "vessel in navigation":

> 1. The structures involved were constructed and used primarily as work platforms;
>
> 2. They were moored or otherwise secured at the time of the accident; and
>
> 3. Although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation functions they performed were merely incidental to their primary purpose of serving as work platforms.

Subsequent cases applied this standard and amplified factors to be considered in resolving the first element of the above-cited test regarding whether the structures were constructed and used primarily as work platforms. *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40, 43 (5th Cir. 1989); *Gremillion v. Gold Coast Catering Co.*, 904 F.2d 290 (5th Cir. 1990); *Ducrepont v. Baton Rouge Marine Enterprises. Inc.*, 877 F.2d 393 (5th Cir. 1989).

In two recent cases, the Fifth and Eleventh Circuits have applied this vessel test to spud barges used as work platforms (comparable to the spud barge in this case) and have affirmed summary judgments for defendants by concluding the structures were not "vessels in navigation". *Ellender v. Kiva Construction & Engineering, Inc.*, 909 F.2d 803 (5th Cir. 1990). *Hurst v. Pilings & Structures. Inc.*, 896 F.2d 504 (llth Cir. 1990).

A review of the First Circuit's decision in this case reveals a clear intent to adopt and follow the prevailing case law on this point from the other circuits—principally the Fifth Circuit. In

fact, one Eleventh Circuit case cited by DiGiovanni as evidence of a disparity in the standards, *Hurst v. Pilings & Structures, Inc., supra,* is expressly cited by the First Circuit in its decision. (App. A, p. 8a, Petition.) Another case cited by DiGiovanni, *Johnson v. Odeco Oil & Gas Co., supra,* applies the vessel standard and amplifies factors to be considered in applying one element of the "vessel-in-navigation" test and nothing in the First Circuit's opinion in this case conflicts with the holding in *Johnson.*

The two remaining cases cited by DiGiovanni for his argument of a purported split in the circuits actually apply the same test but are distinguishable factually. *Sharp v. Johnson Brothers Corp.*, 917 F.2d 885 (5th Cir. 1990); *Ducote v. V. Keeler & Co., Inc.*, 953 F.2d 1000 (5th Cir. 1992). In each of those cases, the Fifth Circuit found sufficient facts existed to submit the vessel issue to the jury. As a result, in *Sharp*, a directed verdict for defendant was reversed and remanded. In *Ducote*, a summary judgment for defendant was reversed and remanded. Unlike the First Circuit's decision in this case, the Fifth Circuit in each of those cases found sufficient facts existed relating to movement and transportation of the structure to preclude summary judgment or directed verdict. But the critical point for consideration here is that the Fifth Circuit utilized the same standard in those cases as in *Bernard v. Binnings Construction Company, Inc., supra,* and the line of cases following it. *See Sharp,* 917 F.2d at 888; *Ducote,* 953 F.2d at 1003.

Accordingly, DiGiovanni has provided no authority to substantiate his contention that the First Circuit decision has created a split in the circuits. The First Circuit's decision has, in fact, resolved an arguable split in authority that might otherwise have existed.

B. THE DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

DiGiovanni has erroneously asserted that the First Circuit decision is in conflict with one or more decisions of this Court. None of the cases cited in support of this contention even consider the "vessel in navigation" test issue under the Jones Act.

Initially, DiGiovanni states that the First Circuit decision is an "affront" to the recent decision of *Southwest Marine. Inc. v. Gizoni*, __ U.S. __, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991) in that the structure in *Gizoni* had more physical features associated with a vessel. In *Gizoni*, this Court did not consider any issue relating to the "vessel in navigation" test under the Jones Act.[4] Instead, the issue was whether a maritime worker whose occupation (ship repairman) was expressly enumerated in the LHWCA was precluded from bringing an action as a seaman under the Jones Act as a matter of law. This Court answered this question in the negative. *Gizoni*, 116 L.Ed.2d at 418.

DiGiovanni also contends that the First Circuit decision "conflicts with this Court's rationale behind" *McDermott International Inc. v. Wilander, supra*. In *Wilander*, this Court did not consider any issue regarding the "vessel in navigation" test. Rather, the court resolved a split in the circuits on the employment relation prong of the seaman's test regarding the individual's job duties.

Lastly, DiGiovanni argues that this Court has previously agreed that "non-conventional watercraft" with lesser mobility are vessels for purposes of the Jones Act. *Gianfala v. The Texas*

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[4] The Ninth Circuit reversed summary judgment for defendant on two bases: 1) questions of fact existed as to plaintiff's status as a seaman; and 2) it rejected the district court's ruling that Gizoni, having received LHWCA benefits, was precluded from pursuing remedies as a Jones Act seaman as a matter of law. *Gizoni* at 116 L.Ed.2d 413-14.

Co., 350 U.S. 879 (1955); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957). This contention, on its face, is not one of conflict with past decisions of this Court. Further, in *Gianfala,* this Court merely issued a per curiam order without opinion reversing the circuit court and reinstating the jury's verdict. 350 U.S. 879. Additionally, the "vessel in navigation" test was not an issue in the lower courts in that case.

In *Senko*, this Court, again, did not consider the "vessel in navigation" test. Instead, the issue concerned application of the employment relation prong of the seaman's test. The discussion of the opinion focused exclusively on the petitioner's job duties in considering whether sufficient facts existed to uphold a determination that he was a "member of the crew."

II. THE DECISION DOES NOT CONFLICT WITH ANY FEDERAL STATUTE.

DiGiovanni admits that the term "vessel" does not appear in the Jones Act and, therefore, no statutory construction issue exists. The term "vessel" or "vessel in navigation" is part of a judicially crafted test for application of the term "seaman" in 46 U.S.C. §688(a). The interpretation of the term "vessel in navigation" has evolved for the purpose of aiding in the overall application of the Jones Act to various employees in varying circumstances with some connection to maritime commerce.

As a result, the judicial interpretation of the term "vessel in navigation" for purposes of application of the Jones Act—by the First Circuit or any other court—can not conflict with the term as used in any federal statute, regardless of the statutory context. Apparently DiGiovanni does not contest this point, but instead argues that the judicial interpretation of the term "vessel" *should* coincide with the term as construed in one or more of the various cited statutes. This contention is without merit. DiGiovanni fails to cite any Jones Act precedent of this Court or any other court which relies on the any one of the various statutory definitions of

"vessel" in determining whether a plaintiff is a Jones Act seaman.

As this Court stated in *Wilander*, "[a]ll who work at sea in service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." 111 S.Ct. at 817, 112 L.Ed.2d at 882. The statutory definitions which DiGiovanni seeks to have grafted onto the years of Jones Act decisional precedent defining "vessel" would expand the protection of the Jones Act beyond that intended by Congress or recognized by this Court in *Wilander*. A common thread running through many of the other statutory definitions of vessel is the phrase "*capable of being used* as a means of transportation on water." (Petition, Appendix A, 23a-28a) (emphasis by the court). Under such a definition an out-of-service steamer which is permanently moored to the shore and used as a beach front restaurant is now a "vessel" because it is *capable* of being used as a means of transportation on the water. Thus, the waiter, who was previously covered by the state's workers compensation laws, now becomes a Jones Act seamen because of the restaurant's new-found vessel status. Such shore-based workers do not "work at sea in service of a ship [and] face those particular perils to which the protection of maritime law . . . is directed." *Wilander*, 111 S.Ct. at 817, 112 L.Ed.2d at 882. As this Court stated in *Wilander* and reaffirmed in *Gizoni*, "the key to seaman status is employment-related connection to a vessel *in* navigation." *Wilander*, 111 S.Ct. 807, 112 L.Ed.2d at 882; *Gizoni*, 112 S.Ct. 486, 116 L.Ed.2d at 415. (emphasis supplied). That the structure may at some future point in time be capable of being used as a means of transportation on the water does not answer the question of seaman status. This is why the Jones Act jurisprudence defining vessel status has been judicially developed and has evolved separately from the other statutory definitions cited by DiGiovanni.

III. THERE ARE NO SPECIAL OR IMPORTANT REASONS WHICH WOULD JUSTIFY THE EXERCISE BY THIS COURT OF ITS DISCRETION TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

There is no aspect of this case which warrants review by this Court. The First Circuit, in its decision, responsibly reviewed and revised its "vessel in navigation" standard in order to achieve uniformity among the circuits on this issue. Just as it did in the early 1970's, the First Circuit in this case followed the prevailing view of the other circuits—principally the Fifth Circuit.

Any decision by this Court to review this case would run counter to the implicit motivation associated with Rule 10.1(a) of this Court's Rules which prompts the various circuits to conform their decisions on an issue and avoid conflict among themselves.

DiGiovanni asserts that this Court should review this case because he believes the First Circuit's decision may be ambiguous and, consequently, may spawn further litigation. Even if this Court would accept DiGiovanni's assertion, no basis for granting a writ of certiorari would exist. The circuit court, as always, should be afforded the opportunity to clarify any ambiguity in one of its own decisions before this Court should utilize its limited resources in the matter.

CONCLUSION

DiGiovanni's Petition for Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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